



City of Tigard Memorandum

To: Mayor John Cook and Tigard City Council

From: John Floyd, Associate Planner

Re: Temporary Prohibition on Medical Marijuana Dispensaries

Date: February 6, 2014

Request

The Community Development Department was asked to investigate a ban or temporary prohibition on medical marijuana dispensaries. The purpose of the prohibition would be to develop options for Council regarding the regulation or prohibition of such land uses within the City.

Discussion

Community Development staff and the City Attorney's office have investigated the issue, including a review of the Tigard Development Code and recent case law, and believe language already exists within the code that would support a prohibition on medical marijuana dispensaries. This language is found within the general administrative provisions which requires "each development and use application...be consistent with...all applicable state and federal laws and regulations" (18.210.030.A). As a result, all land uses within the city must be found compliant with both state AND federal law. Regardless of various state actions to partially legalize the use of marijuana for medical and/or general use, it still remains a crime to manufacture, possess, or distribute the drug under federal law under any circumstances within any state of the union. As discussed below, Tigard is not alone in trying to navigate the conflicting and overlapping requirements of state and federal law.

The League of Oregon Cities (LOC) met with the US Attorney for Oregon to discuss medical marijuana, but was unable to receive any additional clarification beyond the current opinion of the Obama Administration regarding enforcement of the federal Controlled substances Act. What is known through this opinion is that the current administration has stated that the federal government will not generally take enforcement action in medical marijuana cases except where children are being exposed to the operation, or where medical marijuana is being used as a front for illegal trafficking. However, it should be noted that this position could change at any time, especially with a new administration. A change in federal position could result in significant local costs, including the prosecution of local business owners, landlords, and residents

otherwise compliant with state law, along with requests for law enforcement assistance from the Tigard Police Department.

The issue of federal overlap is not limited to Tigard, and CD staff spoke to planning staff in Ashland, Tualatin, and Hillsboro. Of interest is the fact that unlike these cities, Tigard has explicit language in its land use regulations regarding compliance with federal laws.

The City of Ashland has a provision in their business license regulations that requires consistency with federal law, and is adopting an ordinance to remove that provision so it will not have to deny business license applications submitted by dispensaries. So long as this requirement was still in their code, Ashland officials believed it opened the city to potential Equal Protection Clause challenges for selective enforcement of this provision. As this provision is part of the municipal code pertaining to business licenses and not part of the land use code, Ashland planning staff indicated they were regulating medical marijuana dispensaries as medical land uses, and leaving the matter of dispensary control to law enforcement and the state.

Tualatin has a similar provision in their municipal code to that of Ashland, and is presently considering a temporary prohibition until December 31, 2014 in order to allow the city more time to evaluate the new state rules regarding dispensaries and perform more public outreach in developing local land use restrictions and/or prohibitions. When Tigard staff inquired about the federal overlap regarding controlled substances, Tualatin staff indicated there was a perception of greater risk of litigation at the local and state level than there was from the federal level, and were responding accordingly.

Hillsboro is also in the process of adopting locational restrictions on dispensaries. When asked about the conflict with Federal Law, Hillsboro planning staff indicated they had not yet been challenged on the issue, and pointed out that no one has appealed a dispensary denial to LUBA or the courts to their knowledge and as such the outcome was unclear. Hillsboro staff also indicated they were relying upon a November 2013 memorandum from the Oregon legislative counsel asserting that Oregon law preempts local municipal restrictions of medical marijuana facilities. This memorandum cites case law and two bills passed during the 2013 session. These bills include HB 3460 which creates a registration system for the transfer of marijuana and usable plants, and SB 863 which pre-empts local governments from taking any action to inhibit or prevent the production or use of agricultural seeds, flower seeds, nursery seeds, or vegetable seeds.

The General Counsel for the LOC disagrees with legislative counsel's opinion of HB 3460. LOC believes HB 3460 does not preempt local land use regulation; it just creates a registration system and other civil requirements to be administered by the Oregon Health Authority (OHA). LOC tried to get language within HB 3460 specifically addressing preemption, but was unsuccessful at the time given the political landscape. This is important as Oregon case law has generally taken the position that until the intent to preempt is unambiguously expressed, "local

requirements compatible with compliance with the state's standards are not preempted" *Gunderson, LLC v. City of Portland* (2012), citing *State ex rel Haley v. City of Troutdale* (1978). As HB 3460 stands, there is no direct language addressing preemption. Moreover, final Oregon Health Authority Rules to implement HB 3460 state "Registration by the Authority is not a guarantee that a facility is permitted to operate under applicable land use or other local government laws where the facility is located."

Similarly, there is a legal question regarding the applicability of SB 863 to medical marijuana dispensaries. Medical marijuana is not specifically mentioned in the bill or its legislative history, as the bill was more focused on biotech crops than cannabis and there is no specific mention of medical marijuana in the bill. In addition, as used in HB3460 the definitions of "usable marijuana" and "immature marijuana plants" do not overlap with the statutory definition of agricultural or nursery seed under ORS 571.300, in that a seed is not a plant.

Finally, in 2013 the California Supreme Court concluded that local governments were not preempted from banning facilities that distribute medical marijuana, using a similar preemption analysis and similar medical marijuana laws as Oregon. This may be indicative of how a similar challenge would play out in Oregon.

In sum, Tigard staff and legal counsel believe the City has authority to regulate or prohibit medical marijuana dispensaries under the Tigard Development Code as it presently exists. This provision in Tigard's code was not present in that of Ashland, Tualatin, or Hillsboro and appears to create a stronger case under land use law than in those cities, and as such may create more actionable options than a prohibition by ordinance. Such a move may be advantageous in the short term, as the state may adopt additional clarifying regulations and/or legal challenges may play out that will clarify the City's options.

Recommendation

If Council wishes to place temporary prohibition on dispensaries, this action would be defensible as discussed above. The prohibition could be temporary in order to allow sufficient time for the adoption of new land use regulations, or of indeterminate length and until such time as medical marijuana dispensaries can demonstrate affirmative compliance with Federal Law. The manner of the prohibition could take one of two forms.

1. The Community Development Director and City Attorney could prepare a written interpretation of the existing Tigard Development Code as it pertains to medical marijuana dispensaries and federal law, which Council could adopt or acknowledge as the City's official interpretation; and/or
2. Council could adopt a temporary prohibition by ordinance. A draft has been prepared should Council wish to consider this option. The draft establishes a temporary prohibition until the end of the year, at which time Council could allow the ordinance to sunset, or extend or revise it as necessary.